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No.

in the
Supreme Court
of the
United States

OCTOBER TERM, 1982

COLEMAN R. ROSENFELD and
GLADYS ROSENFELD,

Petitioners,

vs.

NEW ENGLAND MERCHANTS NATIONAL BANK
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEAL FOR
THE FIFTH CIRCUIT UNIT B

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QUESTIONS PRESENTED FOR REVIEW

1. DOES THE FAILURE OR REFUSAL OF THE COURT OF APPEALS TO RULE ON AN ISSUE PROPERLY RAISED, BRIEFED AND ARGUED ON APPEAL, WHERE SAID ISSUE IS DISPOSITIVE OF THE CASE OR A SIGNIFICANT PORTION OF IT, CONSTITUTE DENIAL OF ACCESS TO THE COURTS AND THUS DENIAL OF DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. (*PETITIONERS RESPECTFULLY BELIEVE THIS TO BE A CASE OF FIRST IMPRESSION FOR THIS COURT.*)
2. IN A JURY TRIAL DID THE CONDUCT OF THE DISTRICT COURT BELOW, IN ADMITTEDLY TRYING TO "PROTECT" RESPONDENT AGAINST PETITIONER, IN ADMITTEDLY DECIDING THE CREDIBILITY OF THE WITNESSES, IN EXCLUDING MATERIAL AND RELEVANT EVIDENCE AND IN DIRECTING A VERDICT, CONSTITUTE CLEAR AND UNAMBIGUOUS BIAS AND PREJUDICE SUCH AS TO DENY PETITIONERS' DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

RULE 28.1 LISTING

As to Petitioners, the following are the real parties in interest and any related companies: Coleman R. Rosenfield, Gladys Rosenfield, Mama Tino, Inc.

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Petitioners COLEMAN R. ROSENFELD (hereinafter "Rosenfeld") and GLADYS ROSENFELD (hereinafter "Mrs. Rosenfeld" and collectively "Petitioners Rosenfeld") pray that this Court issue a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit Unit B which affirmed the directed verdict in favor of Respondent NEW ENGLAND MERCHANTS NATIONAL BANK (hereinafter "NEMNB") and which *expressly refused to rule on the propriety of the dismissal by way of Summary Judgment of Petitioners' Counterclaim even though it was an issue properly raised on appeal and briefed by both parties.*

OPINION BELOW

The opinion of the court of appeals, reported at ____ F.2d ____ (5th Cir., Unit B, 1982) is printed in the Appendix to this Petition (A.2).

JURISDICTION

The court of appeals filed its opinion and entered its judgment on July 1, 1982. A timely petition for rehearing which raised, among other things, the court of appeals' failure to rule on the issue of the summary judgment disposition of the Petitioners' counterclaim was denied, without opinion, on August 30, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a) (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in part, as follows:

No person shall be . . . deprived of life, liberty, or property without due process of law; . . .

UNITED STATES STATUTES INVOLVED

28 U.S.C. §1291, Judiciary Act

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Respondent NEMNB brought suit in the United States District Court for the District of Massachusetts against Petitioners in July 1974 based on alleged guarantees. The complaint was filed over four years after the occurrence of the facts which give rise to the claim. The case was subsequently transferred to the United States District for the Southern District of Florida based on forum non-convenience pursuant to 28 U.S.C. §1401(a).

Petitioners raised various defenses including conditional delivery and filed a counterclaim alleging fraudulent inducement relative to the execution of the alleged guarantees.

On March 26, 1976 the trial court granted Respondent's motion for summary judgment as to the counterclaim on the basis that Petitioners' counterclaim for fraud was barred by the applicable statute of limitations even though it arose out of the same factual situation which gave rise to Respondent NEMNB's claims on the alleged guarantees which were not barred by any statute of limitations.

Thereafter a jury trial was held on February 14, 1977. At the close of the case, but before the jury returned a verdict, the trial court directed a verdict in

favor of Respondent NEMNB and against both Petitioners by order dated March 9, 1977. From that directed verdict a timely appeal was taken to the United States Court of Appeals for the Fifth Circuit, Unit B.

In its opinion entered on July 1, 1982, the court of appeals affirmed the trial court's directed verdict but *expressly failed and refused to rule on the issue of the summary judgment* which dismissed Petitioners' Counterclaim even though that issue was clearly raised on appeal and briefed by both sides.¹ (A. 13). In so doing the court of appeals stated in its Opinion that:

This counterclaim was dismissed prior to trial on statute of limitation grounds and is not involved in this appeal. (Emphasis added).

(A. 13).

Thereafter Petitioners filed a timely petition for rehearing in which they, among other things, pointed out that the court of appeals had improperly failed to rule on the validity of the summary judgment dismissing to Petitioners' Counterclaim. (A. 38). The court of appeals denied the petition for rehearing on August 30, 1982 without opinion and again refused to address the vital issue of Petitioners' counterclaim. (A. 43).

From the foregoing rulings the following Petition for Certiorari is taken.

¹See, excerpts from Appellants' and Appellee's briefs reprinted in the Appendix to this Petition.

B. STATEMENT OF THE FACTS

In 1968 Petitioner Coleman Rosenfield was a lawyer and an officer of a franchise business known as Mama Tino's Inc. That company promoted franchised Italian restaurants. In 1969 and 1970 Mama Tino's borrowed money from Respondent NEMNB for business purposes. Thereafter the business experienced difficulties and a \$2,500,000.00 public offering it had anticipated did not materialize.

With this background Petitioner Rosenfield and the President of Mama Tino's, a Mr. Fiorentino, sought an extension of the company's loans from Respondent NEMNB. Respondent would only extend the loans if both the Petitioners and Mr. and Mrs. Fiorentino executed personal guarantees for the company's indebtedness.

Petitioner Rosenfield claimed that the guarantees were signed and delivered to NEMNB on the express condition that the bank would lend the company an additional \$50,000.00 as well as extend the existing loans. Rosenfield testified that on the basis of NEMNB's unequivocal promise of additional funding, the guarantees were executed and conditionally delivered in February, 1970.

Thereafter, the additional \$50,000 loan was not forthcoming, which materially contributed to the necessity for the company to file for bankruptcy in May, 1970.

There was deposition testimony from a Mr. Carl Schaeffer that at or just before the bankruptcy a senior officer of Respondent NEMNB had stated that the bank had committed to make an additional \$50,000 loan

to Mama Tino's and then decided to renege on that additional loan. Mr. Schaeffer was an attorney for a third party bank which had dealings with Mama Tino's. He had been personally involved in the negotiations to try and save the company prior to the bankruptcy. (R. 670-671).

Mr. Schaeffer's deposition testimony was proffered into evidence by the Petitioners. It was excluded by the trial court on the basis that Mr. Schaeffer could not personally testify that Respondent NEMNB's offer of an additional loan had been made at or before the date of the execution of the guarantees. (A. 19; T. 55).

Respondent NEMNB was represented by attorney, J. J. Simons, in the bankruptcy proceeding. Attorney Simons and Respondent Rosenfield had a conversation which was extremely relevant to this case; however, they disagree as to what was said. Respondent Rosenfield testified that Mr. Simons, the attorney for Respondent NEMNB, told him that NEMNB would not enforce the guarantees of Petitioners. (T. 122-123). Mr. Simons testified that he had said that he, Mr. Simons, would not proceed against the Rosenfields on their guarantees but "believe[s]" he told Petitioner Rosenfield that Respondent NEMNB was going to sue. (T. 178).

Thereafter, Respondent NEMNB waited over four years to file the present action. The expiration of this period allowed the claims Petitioners had against Respondent to expire based on the running of the relevant statute of limitations.

JUDICIAL CONDUCT DURING AND BEFORE TRIAL

During the course of the pre-trial conference, held just before the trial, the trial judge stated "Probably we shouldn't have the jury that sat on the last case." (T. 47). That jury, which was still part of the venire panel at the time of this trial, had just rendered a defendant's verdict in a guarantee case strikingly similar to the present case.

Throughout the pre-trial conference the judge indicated his readiness to direct a verdict or grant summary judgment in favor of the Respondent (T. 43, 44, 45) but refrained from doing so because of his lack of faith in the court of appeals (T. 68).

At the trial itself the judge openly stated that he thought Petitioner Rosenfield, who he pointed out was a lawyer, was lying² (T. 116, 124, 132). At one point at the close of Petitioner Rosenfield's direct testimony the judge stated he was going to direct a verdict because Petitioners were bringing in "extraneous information" and Petitioner Rosenfield was "volunteering information" (T. 127). Counsel for Respondent, in whose favor such a directed verdict would have run, had to beg the judge not to do so pointing out it would constitute reversible error. (T. 127-128)

Following this a truly remarkable exchange occurred in which the judge candidly admitted he had been

²The district court stated: "I don't believe a word this witness is testifying to" and "I think he has been lying from the minute he got on the stand." (T. 132)

trying to protect the Respondent NEMNB. It was as follows:

Mr. Cohn (Respondent NEMNB's counsel): I'm not sure it is so obvious to the jury, Your Honor. If I recall, none of them ever had any dealings with banks.

The Court: I am going to let you go ahead. *I have been trying to protect you, Mr. Cohn.* But you go ahead. (Emphasis added) (T. 306).

At the close of the testimony the judge directed a verdict in favor of Respondent stating that he, rather than the jury, had determined the credibility of the witnesses and which witnesses were to be believed. (T. 316).³

During the course of the trial Petitioners moved the trial judge to recuse himself when it became apparent that he had abandoned any pretense of impartiality in the conduct of the trial. The judge denied that motion. (T. 171).

³The district court's exact quote is:

Ordinarily it is up to the jury to make a determination of credibility of witnesses. *I make that determination myself.* (T. 316)

(Emphasis added).

REASONS WHY THE WRIT SHOULD BE GRANTED

The Constitution of the United States and its statutes guarantee an individual the right to a fair and impartial trial. Additionally, the individual is guaranteed the right of appeal to the court of appeals. 29 U.S.C. §1291. This right necessarily requires that the court of appeals rule on all issues that are dispositive of the merits of the controversy if properly raised on appeal.

In the present case both of these rights were denied Petitioners. The trial judge's conduct clearly demonstrated his bias against Petitioners and towards Respondent NEMNB. It would appear from the record that this bias caused the trial judge to exclude relevant testimony in the form of Mr. Schaeffer's deposition which had it been admitted, would have given rise to a jury issue. Additionally this bias would appear to have caused the trial judge's determination of the credibility of the witnesses, especially as between Respondent's lawyer Mr. Simon and Petitioner Rosenfield relative to whether or not Respondent had agreed and promised to not pursue the guarantees. This was clearly a very material issue which should have gone to the jury.

Had the trial judge not acted in a biased manner he would have admitted evidence whose admittance is required by law and not ruled on the credibility of witnesses all of which would have created jury issues which in turn would have prevented a directed verdict in favor of Respondent.

The court of appeals' opinion expressly approves the trial judge's flagrant bias against Rosenfield. (A.

23) Further, contrary to the very law cited in the opinion the appellate court also makes prohibited credibility choices. (A. 18)

Further, the Petitioners were entitled as a matter of right under the Constitution of the United States, its statutes and the case law to have their appeal heard and ruled on as to the trial court's grant of summary judgment in favor of Respondent based on the expiration of the statute of limitations relative to Petitioners' Counterclaim. The court of appeals' failure to rule on this issue constituted a denial of this right. (Petitioners respectfully believe this issue to be one of first impression for this Court.)

I.

PETITIONERS WERE DENIED ACCESS TO THE COURTS AND THUS DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT AS A RESULT OF THE COURT OF APPEALS FAILURE AND REFUSAL TO RULE ON AN ISSUE PROPERLY RAISED AND BRIEFED ON APPEAL.

The trial court below, ruling that Petitioners' counterclaim, which sounded in fraud, was barred by the applicable statute of limitations, granted a summary judgment in favor of Respondent NEMNB as to that counterclaim (A. 28-29). That summary judgment order did not dispose of all the claims between all the parties and thus was not appealable at the time it was entered. Fed.R.Civ.P. 54(b); *Adams General Contractors, Inc. v. Department of Housing and Urban Development*, 501 F.2d 176 (5th Cir. 1974).

The summary judgment became appealable at the close of the case below when the trial court entered its order of directed verdict as to all remaining issues between the parties. Fed.R.Civ.P. 54(b).

The granting of that summary judgment was duly raised on appeal and briefed as an issue on appeal by Appellants Rosenfield before the court of appeals below (A. 30). The Respondent NEMNB in turn replied to the summary judgment issue and addressed it in its brief (A. 24). This issue was thereafter orally argued before the court of appeals.

Following all of this the court of appeals in its decision held that:

The Rosenfields also counterclaimed, seeking damages from the bank for refusing to lend Mama Tino an additional \$50,000 for working capital. *This counterclaim was dismissed prior to trial on statute of limitations grounds and is not involved in this appeal.*

(Emphasis added). (A. 13).

The error of the foregoing and the court's failure to rule on the issue was pointed out to the court of appeals in Petitioners/Appellants' petition for panel rehearing (A. 38). That petition was denied by the court of appeals without opinion or any other ruling as to the summary judgment issue on August 30, 1982 (A. 43).

Petitioners believe that this case presents an issue of first impression for this Court. After diligent research

Petitioners have been unable to find any case in which this Court has ruled on the propriety of a court of appeals failing or refusing to rule either directly or indirectly on an issue properly raised on appeal.

The Fifth Amendment to the United States Constitution guarantees due process of law. Pursuant to that amendment and Article III of the Constitution of the United States Congress created the various courts of appeal and made them the only court in which there was an appeal by right from the final decisions of the district courts. 28 U.S.C. §1291.

Therefore, the court of appeals below was the only court to which the Petitioners had the right to appeal the district court's dismissal of their counterclaim by means of summary judgment. It is implicit from the right of appeal that the court of appeals has a absolute duty to rule on all issues properly raised on appeal.

The case law tends to imply such a duty on the part of the courts of appeal but does not expressly so state in relations to civil cases. For example the United States Fifth Circuit Court of Appeals has stated that:

[O]ur function is, of course, to assay the asserted errors of the judge . . .

Molnar v. Gulfcoast Transit Co., 371 F.2d 639 (5th Cir. 1967). See also, *United States v. State of Florida*, 482 F.2d 205 (5th Cir. 1973); *Empire Life Ins. Co. v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972).

In a criminal setting the issue has been somewhat more directly addressed by the Ninth Circuit which

stated that a criminal appeal imposes upon the appellate court the duty of determining the questions which are raised on appeal. *Leahy v. United States*, 272 F.2d 487 (9th Cir.) cert. dismissed 81 S.Ct. 465, 364 U.S. 945 (1961).

None of these decisions, nor any other case which Petitioners have been able to find after diligent research, rule directly on the issue of an appellate court's having failed or refused to rule on an issue properly raised on appeal.

The court of appeals' failure below to rule on an issue which was clearly and properly presented before it denied Petitioners access to the courts of appeal as provided for under 28 U.S.C. §1291 and thus constituted a denial of due process of law as guaranteed under Amendment Five to the Constitution of the United States.

This denial should be addressed by this Court since it raises issues which are far wider than this case alone such as an appeals court's ability to "duck" difficult or unpopular issues by simply not ruling on them. In the present case the court of appeals, either by mistake or intent, "ducked" the issue by stating in its opinion that "This counterclaim . . . is not involved in this appeal." (A. 13). This Court cannot allow such a denial of justice to go uncorrected.

II.

PETITIONERS' COUNTERCLAIM WAS NOT BARRED BY THIS APPLICABLE STATUTE OF LIMITATIONS IN THAT IT AROSE OUT OF THE SAME FACT SITUATION AS RESPONDENT'S CLAIMS.

Petitioners' based their counterclaim on an agreement by Respondent NEMNB to provide an additional \$50,000 in funding to Petitioners' company, Mama Tino Inc., in return for Petitioners' guarantees of the company's obligations to the Respondent bank. Petitioners alleged in that Counterclaim that they were fraudulently induced by Respondent NEMNB to give their guarantees to the bank in that the bank had no intention of going through with the additional funding at the time it induced Petitioners to sign the guarantees in return for the additional funding for the company. Thus, the counterclaim arises out of the exact same factual situation which formed the basis for Respondent's NEMNB claims against Petitioners Rosenfield based on the guarantees.

Respondent carefully waited over four years to file its claims against Petitioners in the case below. This was done after Petitioner Rosenfield testified he was told by Respondent's attorney, Mr. Simons, that the Respondent would not bring suit on the guarantees and that attorney admitted the occurrence of such a conversation. The only difference in the two versions of the story is that the attorney, Mr. Simons, testified

that he said he, Mr. Simons, would not bring suit rather than his client the Respondent would not bring suit.⁴

Thereafter, Respondent NEMNB carefully waited over four years before bringing the present action. During that four year period, and in reliance on the representation that no suit would be brought by Respondent, Petitioners allowed the applicable statute of limitations governing claims of fraud to expire.

The old and extremely harsh common law rule was generally that compulsory counterclaims ordinarily barred by a statute of limitation were not revived by the filing of a claim arising out of the same factual situation. For the history and application of this rule see generally 53 C.J.S. Limitations of Actions §106 Set Off, Counterclaim and Cross Demand.

The more modern rule which is being adopted around the country is that such a counterclaim is not barred. Rather the running of the statute is tolled by the filing of the main claim. *Hernas v. City of Hickory Hills*, 507 F.Supp. 103 (N.D. Ill. 1981); *Chauffeurs, etc. v. Jefferson Trucking Co., Inc.*, 473 F.Supp. 1255 (S.D. Ind.) *affirmed* 628 F.2d 1023 (7th Cir.) *cert. denied* 101 S.Ct. 942 (1981); *Nalley v. M'Clements*, 295 F.Supp. 1357 (D. Del. 1969); *Azada v. Carson*, 252 F.Supp. 988 (D. Hawaii 1966); *United States v. Southern California Edison Co.*, 229 F.Supp. 268 (S.D. Cal. 1964); *c.f. Erie Lackwanna R.R. Co. v. United States*, 439 F.2d 194 (Ct. Claims 1971).

⁴This clearly raised an issue of credibility which should have been resolved by the jury relative to Petitioners' defenses of estoppel and abandonment and their counterclaim.

Florida has joined in adopting the rule that compulsory counterclaims are not barred by the applicable statute of limitations but that rather such statute is tolled by the filing of the main claim. *Cherney v. Moody*, 413 So.2d 866 (1st Fla. DCA 1982). That case was certified to the Florida Supreme Court.

In the present case the actions of Respondent and its attorney in lulling Petitioners into inaction over a period of in excess of four years while their claims ran is particularly egregious. They demonstrate the exact reason why the modern rule as set forth above should be followed. To do otherwise would allow potential plaintiffs to take unconscionable advantage of the passage of time when they know that claims against them are governed by statutes of limitation which are of a shorter duration than those governing their own claims.

III.

THE TRIAL COURT'S OPEN DISPLAY OF
BIAS AND PREJUDICE IN THE CONDUCT
OF THE TRIAL DENIED PETITIONERS'
DUE PROCESS OF LAW AS GUARANTEED
BY THE FIFTH AMEND AND REQUIRES
REVERSAL OF THE DIRECTED VERDICT
BELOW.

As outlined in the facts above the trial court apparently harbored hostility toward Petitioner Rosenfield because he was an attorney seeking to avoid the effects of a guarantee which he had signed.

Prior to the start of trial the district court sought to exclude jurors who had sat on a prior case from

hearing the present case. That prior jury had ruled in favor of the defendants in another guarantee case and the trial court was not about to let that happen again. The trial court had clearly prejudged the case and was prepared to direct a verdict before the close of the evidence. The judge was dissuaded from doing so only as a result of the pleading of Respondent's attorney at trial who was clearly afraid of reversible error.

Further, the trial judge admitted in open court that he had taken it upon himself to judge the credibility of the witnesses when such a determination was the responsibility of the jury stating:

Ordinarily it is up to the jury to make a determination of credibility of witnesses. *I make that determination myself.*

(T.316) (emphasis added).

Finally, in what can only be considered as a truly remarkable admission by a sitting district judge in the middle of a jury trial the trial court stated to Respondent's NEMNB trial counsel that:

I have been trying to protect you, Mr. Cohn.
(Emphasis added). (T. 306).

There can be no clearer statement of prejudice or bias on the part of a trial court since it is clearly not proper for the trial judge to try and "protect" either side. Rather he is required to be neutral as between the parties. *Cross v. State of Georgia*, 581 F.2d 102 (5th Cir. 1978). A fair trial by an unbiased and nonpartisan

court is the essence of the adjudicatory process. *Baker v. Simmons Co.*, 342 F.2d 991 (5th Cir.) cert. denied 86 S.Ct. 49, 382 U.S. 820 (1965); *National Labor Relations Bd. v. Phelps*, 136 F.2d 562 (5th Cir. 1943). In fact, even the appearance of bias must be avoided. *Commonwealth Coatings Corp. v. Continental Casualty Co. of Puerto Rico*, 89 S.Ct. 337, 393 U.S. 145 (1969).

The appellate court's approval of the conduct of the trial court below in prejudging the case and then acting on that prejudgment to control the admission of evidence, to determine the credibility of witnesses and to direct a verdict in favor of Respondent NEMNB constituted a deprivation of Petitioners' property without due process of law in violation of the Fifth Amendment of the United States Constitution. *Rosenberg v. Baum*, 153 F.2d 10 (10th Cir. 1946).

The court of appeals below ruled that there was no legal prejudice to Petitioners because the district court properly directed a verdict in favor of Respondent NEMNB. This, however, ignores the factor of the district court having controlled the flow of evidence into the record by excluding pertinent deposition testimony and improperly ruling on the credibility of the witnesses as is more fully discussed below. Such actions were clearly controlled by the court's apparent bias and prejudice. Thus, they fatally taint the trial court's direction of a verdict in favor of Respondent and must be reversed.

IV.

THE DISTRICT COURT AND COURT OF APPEALS RULINGS THAT PETITIONER ROSENFELD'S TESTIMONY WAS NOT BELIEVABLE BECAUSE IT WAS SELF-SERVING CONSTITUTED A DENIAL OF DUE PROCESS OF THE LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION IN THAT THE SAME STANDARDS WERE NOT APPLIED TO RESPONDENT'S TESTIMONY WHICH WAS EQUALLY SELF-SERVING.

The district court justified its failure to give credit to Petitioner Rosenfield's testimony to the fact that it was "self-serving" because he was trying to avoid the effect of the guarantees. On the other hand, it characterizes the testimony of Respondent's employees who procured the guarantees, who were seeking to enforce them and who made the false representations as being unimpeachable. That testimony was equally as self-serving as Petitioners.

The court of appeals' opinion adopts this line of reasoning. On one hand the opinion rejects Rosenfield's "self-serving" statements and the testimony tending to corroborate them while on the other accepts the bank employees' self-serving statements because they "corroborated" each other. (A. 19-20)

This is especially true when corroborating testimony was excluded. As discussed below, it was improper to exclude Shaeffer's corroborating deposition testimony on the basis that the bank's statement made to him in

May about a \$50,000.00 loan to the corporation could not possibly corroborate Rosenfield's statement that a commitment to fund the additional \$50,000.00 in the future had been made to him by the bank in February.

What is actually involved here is a question of credibility which is solely within the province of the jury to decide *Glazer v. Glazer*, 374 F.2d 390, 400 (5th Cir.) cert. denied 389 U.S. 831, 88 S.Ct. 100 (1968). In fact the district court admitted it was making credibility decisions as between the witnesses (T. 316). Thus, in the present case the district court clearly made improper and prohibited decisions as to credibility.

The court of appeals seeks to justify such actions by finding that Petitioner's testimony was so self-serving and unsupported that it was incredible. In doing so the court of appeals relies on *United States v. Generes*, 405 U.S. 93, 106, 92 S.Ct. 827, 834 (1972). However, the test for such incredible testimony as set forth in *United States v. Generes* requires that no jury could believe the testimony.

Can it be said, as a matter of law, that no jury could believe that, based on the testimony of this case, when Petitioner's Rosenfield executed the guarantee he believed that the bank had promised to lend his company an additional \$50,000.00 as needed?³

³Certainly the district court felt there was some possibility of the jury's believing Petitioners' testimony since it refused to allow the case to go the jury stating:

"Just exactly what I feared would happen has happened. There has been no attempt to present the case on the

Equally important is the district court and the court of appeals application of a double standard as to what constitutes "selfserving" testimony as between Petitioners and Respondent. If Petitioner Rosenfield's testimony is to be viewed as selfserving because he is trying to avoid the effect of the guarantees then Respondent's NEMNB testimony is equally "selfserving" because they are trying to enforce those same guarantees. What we have here is a classic case of witness credibility which must be decided by the jury.

This application of a double standard constitutes a denial of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

(Footnote 5 Continued)

facts. But there has been attempts to throw sand in the eyes of the jury from the very start of this case. I let a lot of evidence in about surmise and all the prejudicial thing that have come in.

(T. 312)

"I concluded fairly early in the trial, and certainly after I heard all of the testimony, that if the jury had brought in a verdict which supported Mr. Rosenfield, I could not, in good conscience, permit that verdict to stand."

(T. 316-317)

V.

THE DISTRICT COURT AS A RESULT OF ITS BIAS IMPROPERLY EXCLUDED FROM EVIDENCE DEPOSITION TESTIMONY OF A MATERIAL WITNESS.

Part of Petitioners' defense was that Respondent had agreed to provide the company, Mama Tino Inc., with an additional \$50,000 loan in return for the subject guarantees. At trial Petitioners sought to introduce the deposition testimony of Carl Schaeffer, an attorney for a third party bank which had also lent money to the company and which had been in negotiation with Respondent relative to the company. Mr. Schaeffer would have testified that a vice-president of the Respondent had admitted in conversation, after the date of the guarantees, that Respondent intended to make such a \$50,000 loan and later reneged on that agreement. Such testimony was relevant to corroborate the fact that a \$50,000 loan was in fact an issue between the parties. The exclusion by the district court was upheld by the court of appeals because the subject conversation occurred some three months after the date of the guarantees. This ignores the fact that the \$50,000.00 was to be funded on an as needed basis in the future after the guarantees were signed.

Rule 402 of the *Federal Rules of Evidence* provides that all relevant evidence is generally admissible. Rule 401 of the *Federal Rules of Evidence* sets forth the definition of relevant evidence:

"Relevant evidence" means evidence having any tendency to make the existence of any

fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. (Emphasis added).

The trial judge excluded the deposition testimony of Mr. Carl Schaeffer, an attorney for Butler's Bank, on the grounds that:

[T]here is nothing in the deposition that indicates that this promise of \$50,000 was made at or prior to the time the guarantee was given (T. 55).

In excluding Mr. Schaeffer's testimony on this ground, the district court and the court of appeals virtually ignored the definition of relevant evidence as set forth above.

Mr. Schaeffer would have testified that Mr. MacAlear, one of the bank's vice-presidents, stated to him that the bank agreed to make \$50,000 in working capital available to the bankrupt corporation, *Mama Tino, Inc.* (R. 670-671).

Under questioning Mr. Schaeffer testified as follows:

Q: So, you have, strictly from your own memory as apart from a written record, a recollection that Mr. MacAlear committed New England Merchants National Bank to make an unsecured loan unconditionally for \$50,000 to Mama Tino?

A: *That is absolutely right.* (R. 670-671).

This testimony directly and unequivocally supports what the Defendants have been contending throughout this litigation; to-wit that there was an agreement to lend an additional \$50,000 in return for the subject guarantees.

Mr. Schaeffer would have further testified that Mr. MacAlear told him that after the promise had been made, the bank decided to renege on it (R. 664).

The fact that these conversations took place subsequent to the execution of the guarantees is immaterial in that they nevertheless has a tendency to show that the \$50,000 loan commitment was, in fact, made. The issue of whether that commitment was made at the time of the guarantees or later was a fact issue for the jury to decide. Moreover, Mr. Schaeffer's testimony would have directly conflicted with that of the bank's representatives who denied that the bank had ever made such a commitment under any circumstances thus raising the issue of the bank's credibility which the court of appeals found to be unimpeachable (T. 197).

Also Mr. Schaeffer's testimony would have further corroborated the fact that the \$50,000 loan would have helped to salvage *Mama Tino's* situation.

In addition, the testimony of Mr. Schaeffer was from a witness who was not only impartial, but might well have been expected to be adverse to the Defendants. Mr. Schaeffer represented Butler's Bank, a major creditor of *Mama Tino* and an institution which had lost substantial sums of money as a result of the *Mama Tino* bankruptcy. He certainly had no reason, therefore, to be favorably disposed toward the Defendants. Clearly, Mr. Schaeffer

would have been perhaps the only truly disinterested witness in the trial. His testimony lent considerable credence and support to that of Rosenfield while, at the same time, reflected adversely on the believability and credibility of the bank's officer.

In excluding the testimony of Mr. Schaeffer the court ruled, in effect, that such testimony had no tendency to make the existence of any fact more or less probable than it would be without such testimony. For the reasons discussed herein, the exclusion of this testimony was clear error.

VI.

THE DISTRICT COURT'S DIRECTION OF A VERDICT IN FAVOR OF RESPONDENT WAS FATALLY TAINTED BY ITS APPARENT BIAS, ITS IMPROPER DETERMINATION OF WITNESS CREDIBILITY AND ITS IMPROPER EXCLUSION OF EVIDENCE.

As is more fully discussed above the district court improperly made determinations of witness credibility, and excluded relevant testimony. Such determinations were or are arguably the result of the district court's apparent bias and prejudice against Petitioner Rosenfield also discussed above.

Even without reference to why it was done had those credibility choices not been made by district court and/or the evidence in question not been excluded the direction of a verdict in favor of Respondent would have been improper. Therefore, the decision below must be reversed.

CONCLUSION

This is a case of first impression as to the court of appeal's failure or refusal to rule on an issue properly raised on appeal. It should be made clear to all the courts that they have a Constitutional and statutory duty to rule on all issues properly raised before them. The failure to do so constitutes a denial of access to the courts in violation of the due process of law requirements of the Fifth Amendment to the Constitution of the United States.

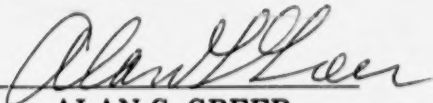
Further, the district court's obvious bias and prejudice below which resulted in improper exclusion of evidence, improper determination of credibility of witnesses and the direction of a verdict also constitute a denial of due process of the law guaranteed by the Fifth Amendment to the Constitution of the United States.

For these reasons certiorari should be granted.

Respectfully submitted,

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